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Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

ZEINAB ALI,

Petitioner,

v.

ALAMO RENT-A-CAR, INC.,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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140 pp

QUESTION PRESENTED

Where an employer imposes an employment directive that fails to reasonably accommodate the religious practice of an employee, does Title VII provide redress only if the employee chooses to disobey and is then disciplined for that violation?

PARTIES

The parties to this action are set forth in the caption.

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Petitioner Zeinab Ali respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on March 6, 2001.

OPINIONS BELOW

The March 6, 2001, opinion of the court of appeals, which is reported at 2001 WL 218788 but is not officially reported, is set out at pp. 1a-8a of the Appendix. The December 7, 1999, Memorandum Opinion of the district court, which is not reported, is set out at pp. 9a-12a of the Appendix. The December 3, 1999, oral opinion of the district judge, which is not reported, is set out at pp. 13a-14a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on March 6, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 2000e-2(a)(1) of 42 U.S.C. provides in pertinent part:

> It shall be an unlawful employment practice for an employer--(1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . .

Section 2000e(j) of 42 U.S.C. provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

STATEMENT OF THE CASE

Petitioner Zeinab Ali, an American citizen originally from Somalia, is a devout Muslim.[1] The tenets of her faith require her to keep her head fully covered in the presence of men other than members of her immediate family.[2] Petitioner

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[1]The facts set out in the Statement are those alleged by petitioner in the courts below. Her complaint was dismissed for failure to state a claim on which relief could be granted.

[2]The long history of this practice is described in The Encyclopedia of Islam, v. 5, pp. 734 *et seq.* (1986).

ordinarily wears a traditional scarf known as a hijab,[3] which covers her hair and her neck. Adherence to this practice is of particular importance during the month of Ramadan, when Muslims are enjoined to be especially faithful to their religious obligations.

In the summer of 1996, Ms. Ali was hired as a management trainee at an Alamo rental office in Arlington, Virginia. During the initial period of her employment she wore her religiously mandated head scarf without incident; petitioner's supervisors did not initially object to or criticize her scarf. In December, 1996, however, Ms Ali's immediate supervisor was replaced by H. Scott Cooper. Shortly after his appointment, Mr. Cooper directed Ms. Ali not to wear her scarf, objecting that it made her look different than other employees. Ms. Ali explained to Cooper that her scarf was required by her religion, and that fulfillment of her religious duties was particularly important because it was then Ramadan. Cooper stood by his prohibition, and admonished Ali to think about the matter over the weekend.

When Ms. Ali returned to work still wearing the head scarf, Cooper summarily transferred her to a different position in which she would have little contact with customers. Ms. Ali, fearful that she would be dismissed if she persisted, then relented. She replaced the full head covering dictated by her faith with a far smaller, more revealing kerchief.

Compliance with Cooper's demand entailed a very serious violation of Ms. Ali's religious obligations. She complained repeatedly about the prohibition both to Mr. Cooper and to his superiors at Alamo, but without success. Throughout the rest of her employment by Alamo, petitioner continued to comply under

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[3] See http://www.islamzine.com/hijab; http://www.islam101.com/women/hijabaq.html.

protest with Cooper's prohibition. She eventually was terminated by Alamo as part of a reduction in force.

Petitioner filed a timely charge with the Equal Employment Opportunity Commission ("EEOC") alleging that Cooper's directive, which he and his superiors knew required her to violate her fundamental religious beliefs, violated Title VII of the 1964 Civil Rights Act. In July, 1999, petitioner brought suit under Title VII in the federal district court for the Eastern District of Virginia, seeking, inter alia, compensatory and punitive damages.

Alamo moved to dismiss the complaint for failure to state a claim for which relief could be granted. Under controlling Fourth Circuit precedent, Alamo argued, a Title VII religious accommodation claim can be brought only where an employer has dismissed or otherwise disciplined a plaintiff because that employee insisted on adhering to his or her religious practices in violation of the employer's requirements.

> Defendant moves for dismissal of Plaintiff's complaint on the sole ground that she cannot in good faith allege that she suffered an "adverse employment action" which is necessary to state a claim for religious discrimination under Title VII of the Civil Rights Act as a matter of law. In this jurisdiction, in order to plead a claim for failure to accommodate a religious belief, an employee must demonstrate the following elements: 1) that she has a bona fide religious belief that conflicts with an employment requirement; 2) that she has informed her employer of this belief; and 3) that she was ***disciplined*** for failure to comply with the conflicting employment requirement. *Chalmers v. Tulon Co.*, 101 F. 3d 1012 (4th Cir. 1996)

> (emphasis added). Even assuming all facts and inferences in the light most favorable to the Plaintiff, she has no evidence that she suffered any adverse employment action . . . .

(Defendant's Memorandum and Authorities in Support of Motion to Dismiss, p. 5) (Emphasis in original).

Ali contended, to the contrary, that Title VII accorded relief where, as here, an employee in order to avoid just such disciplinary action had acceded to her employer's demands that she violate her religious obligations.

> Ms. Ali was told by her new supervisor not to wear her head scarf at work. She protested, to no avail. Rather than risk the loss of her job, and in the hope of appeasing her supervisor, Ms. Ali reluctantly and with misgivings replaced the full head covering she had been wearing with a smaller, less obtrusive one, in derogation of her religious obligations. . . . She could not be disciplined for failure to comply for she chose instead to comply in an effort to avoid the threatened disciplinary sanction.
>
> But this does not mean she suffered no harm. To the contrary, she suffered grievous religious harm when, during the month of Ramadan, she was unable to wear the prescribed head covering during her hours of employment. She subordinated the demands of her religion to those of her employer. Employee[s] cannot legally be forced to accept such harm as a condition of invoking Title VII's protections against religious discrimination. . . . By defendant's theory, Ms. Ali could not seek the

> protections against religious discrimination codified in Title VII unless and until she challenged her supervisor and took whatever punishment followed.

(Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, pp. 1, 5, 6).

After oral argument on the motion, the district court dismissed the complaint. The court accepted Alamo's contention that Title VII is violated only where an employee is disciplined for adhering to his or her religious practices.

> [T]his complaint is not sufficient in my view. It is a legally insufficient complaint. It has not adequately alleged what I believe you have to allege in the Fourth Circuit [which] is that an actual adverse action was taken.

(App. 12a). The district judge indicated that Ali could refile her complaint if she could allege that she had disobeyed her supervisor's orders and had as a result been subject to a "genuine adverse employment action." (*Id.*). The phrase "adverse employment action" in Fourth Circuit jurisprudence refers to dismissal, demotion, or other action by an employer adverse to a plaintiff's economic interests. *E.g., Page v. Bolger,* 645 F. 2d 227, 233 (4th Cir. 1981).

Ali moved for reconsideration, conceding that she had not been subjected to dismissal or other "adverse employment action," but insisting that under Title VII she could obtain redress for the employer-imposed interference with her religious obligations.

> In the case at bar, Ms. Ali was directed to remove her religiously-mandated head-scarf at work. . . . She substantially complied, and for purposes of the adjudication at bar has claimed no work-related detriment. She claims, however, grievous religious injury imposed by her employer.

(Motion to Amend Judgment, pp. 3-4). The district court, however, adhered to its earlier decision, treating as dispositive the fact the Ali had not been disciplined.

> [T]he amended complaint . . . failed to allege the elements of a prima facie case under Title VII in that plaintiff did not allege any adverse employment action. . . . [P]laintiff has even admitted that "for the purposes of this adjudication at bar [she] has claimed no work-related detriment." . . . Thus, it is clear by plaintiff's own admission that the first amended complaint, as currently pled, fails to state a cognizable claim.

(App. 9a-11a).

On appeal Ali reiterated her contention that Alamo's interference with her religious obligations was itself actionable under Title VII.[4] The Fourth Circuit, however, held that Title

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[4]Brief of Appellant, No. 00-1041 (4th Cir.), pp. 7 ("Ms. Ali's complaint, notwithstanding the absence of work-related detriment, meets all the required elements of a failure to accommodate claim. An employer's unwarranted abridgement of an employee's innocuous religious practice is sufficient to give rise to a claim."), 13 ("Ms. Ali did not receive the protection that the statute requires. She seeks to proceed on the merits in order to vindicate her right to appropriate religious observance at work and to offer proof of the damages she suffered by her employer's actions preventing same.")

VII is violated only where an employee is disciplined for disobeying a directive that she disregard her religious obligations, but not where the employee submits to that discriminatory directive.

> Ali sued her former employer, Alamo . . . , under Title VII for refusing to allow her to wear a head scarf at work that was mandated by her religion. The district court dismissed Ali's complaint for failure to allege that she suffered an adverse employment action. . . .
>
> Ali concedes that she did not suffer any legally cognizable adverse employment action. She claims, however, that Title VII religious discrimination claims do not require a showing of adverse employment action. . . . Title VII religious discrimination claims clearly require a showing of adverse employment action. . . .
>
> [T]he [religious] accommodation provision does not affect the basic statutory requirement for adverse employment action. . . . Title VII only prohibits employer practices where the employer discriminates on the basis of religion ***and*** the employee suffers an adverse employment action.

(App. 3a-6a) (Emphasis in original).

REASONS FOR GRANTING THE WRIT

THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF LAW IN A MANNER THAT CONFLICTS WITH DECISIONS OF SEVERAL CIRCUITS AND WITH DECISIONS OF THIS COURT

This case presents a recurring and important question regarding the religious accommodation provision of Title VII. When employees of faith face an employment rule that conflicts with their religious obligations, those workers respond in one of two ways. Some defy their employer's directive, risking and usually incurring dismissal, while others do as ordered, temporarily subordinating their religious duties to their need for employment. The Fourth Circuit holds that only the defiant employees can sue under Title VII; other circuits, not surprisingly, afford judicial relief as well to employees who comply with their employers' directives pending resolution of their Title VII claims. The United States, both in its capacity as a plaintiff and in its capacity as an employer-defendant, has adhered to the broader interpretation of the religious accommodation provision of Title VII.

The Fourth Circuit decision in this case stems from a decision five years earlier in *Chalmers v. Tulon Co. of Richmond*, 101 F. 3d 1012 (4th Cir. 1996).

> To establish a prima facie religious accommodation claim, a plaintiff must establish that: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was ***disciplined for failure to comply*** with the conflicting employment requirement."

101 F. 3d at 1019 (Emphasis added). This formulation of the essential elements of a prima facie case can be satisfied only where there has been both a refusal to comply and resulting discipline; an employee who obeys under protest cannot obtain relief under Title VII. *See Cary v. Anheuser-Busch, Inc.*, No. 95-3154, 1997 WL 342593 *2 (4th Cir. June 23, 1997) (same).[5]

The decision in the instant case applies the Fourth Circuit precedent in *Chalmers*. Had petitioner insisted on wearing the complete head covering mandated by her religious beliefs, in defiance of her supervisor, and as a consequence been dismissed or demoted, she would have been permitted under *Chalmers* to sue for injunctive and monetary relief. But under the decision below petitioner forfeited her Title VII right to reasonable accommodation when, in order to protect her job, she chose instead to comply under protest with that supervisor's prohibition. In most circuits the only prerequisites to a Title VII religious accommodation action are the filing of a timely charge and a timely civil action; in the Fourth Circuit, however, there are two additional prerequisites--defiance and discipline. Under the decision below Title VII simply is not violated where, as here, an employer by engaging in intentional discrimination *succeeds* in coercing an employee into violating her religious beliefs.

The Sixth and Eighth circuits have a similarly restrictive interpretation of Title VII. *E.g., Johnson v. Angelica Uniform Group, Inc.*, 762 F. 2d 671, 673 (8th Cir. 1985) (plaintiff "must plead and prove" discipline by employer); *Brown v. General Motors Corp.*, 601 F. 2d 956, 959 (8th Cir. 1979) (same). A recent lower court decision in the Sixth Circuit illustrates with stark

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[5]"To establish a *prima facie* case of religious discrimination under Title VII, the plaintiff must: (1) have a bona fide religious belief which conflicts with an employment requirement; (2) inform the employer of the belief; and (3) be disciplined for failing to comply with the conflicting requirement."

clarity the meaning and application of the narrow interpretation of Title VII in the Sixth as well as the Fourth Circuit. The plaintiff in that recent case, a Seventh Day Adventist, had sought an adjustment in her work schedule so that she could observe the Sabbath from sundown Friday until sundown on Saturday. When her employer insisted that she work on the Sabbath, the plaintiff obeyed and sued, inter alia, for injunctive relief. The court--like the Fourth Circuit in the instant case--held that the plaintiff's failure to disobey her employer's directives was fatal to her Title VII claim.

> Plaintiff almost entirely acceded to her employer's insistence that she work a schedule that conflicted in part with her Sabbath. . . . By agreeing to work on her Sabbath, . . . Plaintiff avoided suffering any adverse *employment* consequences as a result of her religious beliefs; rather, her personal religious observance suffered on account of her adherence to her work schedule. Yet, Title VII protects only the former, employment-related interests from abridgement. . . . Plaintiff must have suffered a "materially adverse" change in the terms or conditions of her employment, such as termination, demotion, decreased wages, a less distinguished title, a material loss of benefits, or significantly diminished responsibilities. . . . [A]lthough Plaintiff's religious beliefs ostensibly conflicted with the demands of her job, she subordinated the former to the latter, thereby avoiding a conflict which otherwise might have led her employer to take adverse action against her. . . . Plaintiff's failure to insist upon strict adherence to these beliefs, even at the cost of

> negative job consequences, effectively absolved her employer of the responsibility to reasonably accommodate her beliefs.

Stone v. West, 133 F. Supp. 2d 972, 985-986 (E.D. Mich. 2001). Significantly, the Department of Justice, which represented the defendant in *Stone v. West*, had declined to defend the action on this basis. *Id.* at 985.

Most circuits, however, have rejected this narrow reading of Title VII. The Ninth Circuit construes Title VII, not as a mere limitation on employer disciplinary action, but as an affirmative obligation on "an employer to make reasonable accommodations to their employees' religious beliefs, unless such accommodations to an employee's religious observance or practice would cause undue hardship." *Hudson v. Western Airlines, Inc.*, 851 F. 2d 261, 265 (9th Cir. 1988). In *EEOC v. Townley Engineering & Mfg. Co.*, 859 F. 2d 610 (9th Cir. 1988), the Ninth Circuit upheld the issuance of an injunction forbidding the employer from requiring workers to attend weekly prayer services. The aggrieved employee in *Townley* had attended those services as required, while simultaneously complaining to the EEOC. The court of appeals explained that "[a]n employee does not cease to be discriminated against because he temporarily gives up his religious practices and submits to the employment policy." 859 F. 2d at 614 n. 5. In *American Postal Workers Union v. Postmaster General*, 781 F. 2d 772 (9th Cir. 1986), the individual plaintiffs, although objecting on religious grounds to processing draft registration forms, had complied under protest with the directives of the Postal Service. The Department of Justice, representing the Postal Service, "concede[d] that [the plaintiffs] established a *prima facie* case of religious discrimination by demonstrating that they held a bona fide religious belief which prohibited them from processing draft registration forms." *Id.* at 775. The court of appeals held broadly that "where a certain

aspect of an employment situation creates a religious conflict for a particular employee, the employer must take some initial step to reasonably accommodate the religious belief of that employee." *Id.* at 776.

Similarly, the Fifth Circuit holds that Title VII imposes on employers an obligation to accommodate workers' religious views, not merely a limitation on disciplinary measures. "Title VII obligates an employer to 'reasonably accommodate' an employee's religious observance or practice unless doing so poses undue hardship to the employer's business." *Equal Employment Opportunity Commission v. Universal Mfg. Corp.*, 914 F. 2d 71, 72 (5th Cir. 1990). In *Cooper v. General Dynamics, Convair Aerospace Div.*, 533 F. 2d 163 (5th Cir. 1976), the court permitted suit by two Seventh Day Adventists who objected to paying union dues, even though they had not been disciplined for refusing to do so. *Id.* at 165 n. 3. "If the employee's conduct is religiously motivated, his employer must tolerate it unless doing so would cause undue hardship to the conduct of his business." *Id.* at 168. The court thus concluded that the plaintiffs in *Cooper* had established a prima facie case, and remanded for consideration of whether the requested accommodation would impose undue hardship. *Id.* at 171.

The Seventh Circuit also holds that "[u]nder Title VII . . . an employer must reasonably accommodate an employee's religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer's business." *Rodriguez v. City of Chicago*, 156 F. 3d 771, 775 (7th Cir. 1998). The plaintiff in *Rodriguez* was a Roman Catholic police officer who objected on religious grounds to guarding abortion clinics; the plaintiff had carried out such assignments under protest, and sued for prospective injunctive relief. Under those circumstances "the City had conceded that Officer Rodriguez had established a prima facie case of religious

discrimination." *Id.* at 774. Similarly, in the Third Circuit a plaintiff establishes a prima facie case by "demonstrat[ing] that a religiously motivated practice conflicts with an employment requirement." *United States v. Board of Educ. for the School Dist. of Philadelphia*, 911 F. 2d 882, 886 (3d Cir. 1990).

The Fourth Circuit case law relies on a semantic sleight of hand to mask the fundamental difference between the rule in this case and *Chalmers* and the standard prevailing in most other circuits. The critical difference concerns whether proof of discipline against a non-complying employee is the *sole* method of establishing a prima facie case, or merely *one* possible method of doing so. In *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F. 2d 1022, 1026 (5th Cir. 1984), and *Philbrook v. Ansonia Bd. of Educ.*, 757 F. 2d 476, 481 (2d Cir. 1985) (*quoting Turpen*), *aff'd on other grounds*, 479 U.S. 60 (1986), proof of discipline was simply described as one such way in which a plaintiff could establish a prima facie case:

> A plaintiff in a [Title VII] case *makes out* a prima facie case of religious discrimination by proving (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.

(Emphasis added). In the *Chalmers* formulation, however, the prefatory language prior to "(1)" was replaced with a very different formulation: "To establish a prima facie religious accommodation claim, a plaintiff *must* establish." 101 F. 3d 1019 (Emphasis added). A methodology that is merely permissible in the Second and Fifth circuits thus becomes exclusive and mandatory in the Fourth Circuit. (There is a world of difference

between saying "a taxi gets from the Capitol to the White House by driving down Pennsylvania Avenue" and "a taxi going from the Capitol to the White House *must* drive down Pennsylvania Avenue.")

The decision of the Fourth Circuit is flatly inconsistent with this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1976). The central holding of the Fourth Circuit is that Title VII does not actually impose on employers a requirement that they reasonably accommodate the religious practices of their employees. Rather, that circuit insists, Title VII only forbids employers from using discipline to enforce non-accommodating work rules. In the Fourth Circuit non-accommodation is entirely lawful under Title VII, even discriminatory practices adopted out of animus towards a particular religion; federal law does no more than prevent employers from retaliating against employees who do not give in to their employers' demands. This interpretation of the reasonable accommodation provision of Title VII is contrary to the holding in *Hardison*:

> The intent and effect of th[e] definition [of religion in 42 U.S.C. 2000e(j)] was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees.

432 U.S. at 74. Under *Hardison*, a Title VII violation occurs when an employer refuses to make the required accommodation, regardless of whether the victim defies or succumbs to the

unlawful directive.[6] The decision below requires a plaintiff to prove both that "the employer discriminates on the basis of religion *and* the employee suffers an adverse employment action." (App. 6a) (Emphasis in original). *Hardison* squarely holds, to the contrary, that proof of the first element alone is entirely sufficient.

More broadly, the Fourth Circuit's decision is expressly based on the view that Title VII protects only a worker's economic interests, reaching only "adverse employment actions" such as dismissals, demotions, or denials of employment or promotion. On this view, Title VII simply does not apply where an employer takes actions which, although adverse in some other sense, do not affect the discrimination victim's employment, income, or promotion prospects. "[A]n employee who claims that she faced discrimination on the basis of race, color, sex, or national origin must show that she suffered some type of adverse employment action." (App. 4a). This Court has emphatically rejected that narrow view of the protections of Title VII. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), no adverse employment action was even alleged; the plaintiff remained on her job for years, was repeatedly promoted, and it was "undisputed that her advancement there was based on merit alone." 477 U.S. at 60. The injury at issue in *Meritor* was non-economic; Mechelle Vinson was allegedly raped, forcibly fondled, and coerced into a sexual relationship with her supervisor. The employer in *Meritor* insisted that Title VII had not been violated because Ms. Vinson could not prove any "job-related detriment" involving "tangible, economic benefits." (Brief for Petitioner,

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[6]Similarly, *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 70 (1987), noted that "[i]n enacting § 701(j), Congress was understandably motivated by a desire to assure the individual additional opportunity to observe religious practices." That purpose assuredly is as applicable where, as here, the individual is forced to abandon those religious practices, as it is in a case in which the individual remains observant but loses his or her job.

No. 84-1979, pp. 30-37). The employer contended that Title VII would not be violated if a woman gave in to her supervisor's sexual demands in order to keep her job, but only if she were disciplined for spurning those advances.[7] This Court emphatically rejected that argument. "[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." 477 U.S. at 64, *quoting Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978).

Under the decision of the Fourth Circuit, Title VII – absent economic reprisals – protects an employee's sexual autonomy, but not her religious practices. If the supervisor in the instant case had forbidden Ms. Ali to wear a brassiere and she had complied under protest with that directive, the existence of actionable discrimination would have been indisputable. It is simply inconceivable that the protections afforded by Title VII discriminate against workers of faith.

The Fourth Circuit decisions in the instant case and in *Chalmers* have largely nullified for the workers in that circuit the Title VII protections against discrimination on the basis of religion. Under those decisions Title VII simply does not apply to successful efforts to interfere with a worker's religious observances. For employees who cannot afford to risk the dismissal that is usually precipitated by defiance of an employer's rules, the requirement of reasonable accommodation no longer

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[7]Brief for Petitioner, No. 84-1979, p. 36 ("Given the range of relief available for Title VII grievances . . . a victim of harassment does not materially increase her risk by refusing the advances . . . . [I]f reprisal follows, appropriate job-related remedies are at hand. Reprisal for the exercise of Title VII rights is itself a violation of Title VII, § 704(a).")

exists. Employers are expressly at liberty to interfere deliberately, even maliciously, with the religious observances and obligations of any worker who cannot risk economic martyrdom.

The vitality of Title VII's religious accommodation guarantee is of increasing importance in our ever more diverse society. A generation ago many employers had not encountered workers whose religious affiliations were neither Christian nor Jewish. Even in that era, Congress concluded that the religious accommodation provision of Title VII was necessary to protect the religious freedom of American workers. Today the American workforce includes rapidly increasing numbers of Muslims, Buddhists, Sikhs, and countless other denominations, many of whose beliefs and practices may be unfamiliar to supervisors of European ancestry. The risk of intolerance and of indifferent interference with religious observance are unavoidably increased by these sea changes in our society.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Case No. 00-1041

ZEINAB ALI,
Plaintiff-Appellant,

v.

ALAMO RENT-A-CAR, INCORPORATED,
Defendant-Appellee,

and

H. SCOTT COOPER,
Defendant.

METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION; AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INCORPORATED; THE AMERICAN JEWISH COMMITTEE,
Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(CA-99-1025-A)

Argued: December 4, 2000

Decided: March 6, 2001

Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges.

COUNSEL

ARGUED: Kelly Marie Baldrate, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellant. Karen Ann Khan, JACKSON, LEWIS, SCHNITZLER & KRUPMAN, Washington, D.C., for Appellee. ON BRIEF: Victor M. Glasberg, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellant. Robert A. Hirsch, JACKSON, LEWIS, SCHNITZLER & KRUPMAN, Washington, D.C., for Appellee. Woodley B. Osborne, OSBORNE & DEUTSCH, Washington, D.C., for Amici Curiae.

OPINION

PER CURIAM:

Zeinab Ali sued her former employer, Alamo Rent-A-Car, Inc. (Alamo), under Title VII for refusing to allow her to wear a head scarf at work that was mandated by her religion. The district court dismissed Ali's complaint for failure to allege that she suffered an adverse employment action. Ali now appeals, arguing that Title VII religious discrimination claims do not require a showing of adverse employment action. We affirm.

I.

We accept the well-pleaded facts in Ali's complaint and recite them in the light most favorable to her. *See Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996). In August 1996 Alamo hired Ali as a management trainee. While on the job, she wore a head scarf along with her company uniform. She wore the head scarf in accordance with her Islamic religious beliefs. In December 1996 H. Scott Cooper became Ali's new supervisor. Cooper told Ali that she would have to stop wearing the head scarf or be transferred to a position in which she would not be in frequent contact with customers. Ali refused to stop wearing a scarf, and Cooper transferred her.[1]

Ali sued Alamo, claiming that Alamo's refusal to allow her to wear a head scarf was employment discrimination in violation of Title VII. The district court dismissed Ali's complaint for failure to allege an adverse employment action. The court gave Ali eleven days to refile a complaint alleging such action. Ali concluded that she could not meet this circuit's standard for an adverse employment action. Therefore, instead of refiling the complaint, Ali filed a motion to amend the judgment, arguing that Title VII religious discrimination claims do not require a showing of adverse employment action. The court denied the motion and Ali now appeals.

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[1]Alamo subsequently terminated Ali as part of a reduction in force. She concedes that her termination was lawful and unrelated to the events that form the basis for this suit.

II.

We review de novo the trial court's dismissal of Ali's complaint. *See Chisolm v. Transouth Fin. Corp.*, 95 F.3d 331, 334 (4th Cir. 1996). Ali claims that Alamo's refusal to allow her to wear a head scarf was in violation of 42 U.S.C. § 2000e-2(a). That section provides that it is an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-2(a). Under this section an employee who claims that she faced discrimination on the basis of race, color, sex, or national origin must show that she suffered some type of adverse employment action. *See, e.g., Clearwater v. Indep. Sch. Dist.* #166, 231 F.3d 1122, 1127 (8th Cir. 2000) (race); *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1125 (9th Cir. 2000) (national origin); *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999) (sex). The adverse employment action requirement is derived from the statute's requirement that the employer's practice relate to "compensation, terms, conditions, or privileges of employment" or that the practice "deprive any individual of

employment opportunities or otherwise adversely affect his status as an employee." § 2000e-2(a)(1) & (2). Ali concedes that she did not suffer any legally cognizable adverse employment action.[2] She claims, however, that Title VII religious discrimination claims do not require a showing of adverse employment action. In *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1019 (4th Cir. 1996), we said that a plaintiff in a Title VII religious discrimination case must show adverse employment action. Ali argues that *Chalmers* is not controlling because the question of whether adverse employment action is required was not squarely presented. In *Chalmers* the plaintiff had been fired and therefore satisfied the requirement. *See id.* at 1017. Ali, therefore, argues that *Chalmers*'s discussion of the adverse employment action requirement is dicta. We need not decide whether *Chalmers* is controlling because Title VII religious discrimination claims clearly require a showing of adverse employment action.

Section 2000(e)-2(a) joins religion with race, color, sex, and national origin in the same sentence. Because race, color, sex, and national origin require a showing of adverse employment action, Ali bears the burden of showing why religion should be treated differently. Ali argues that (1) the statutory definition of "religion," (2) legislative history, (3) Equal Employment Opportunity Commission (EEOC) regulations, (4) and case law all support the fact that religion, unlike the other bases for discrimination, does not require a showing of adverse employment action. We take up each of Ali's arguments in turn.

Ali claims that the accommodation provision in the statutory definition of "religion" dictates that religion should be treated differently. "Religion" is defined as including "all aspects

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[2]Because Ali concedes that she did not suffer any adverse employment action, we are not required to consider what actually constitutes adverse employment action under Title VII.

of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Congress inserted the accommodation provision in the definition of religion in the wake of *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 330 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). In *Dewey* the circuit court held that an employer does not discriminate on the basis of religion simply by failing to accommodate an employee's religious practice. In light of *Dewey* the accommodation provision is best seen as clarifying that an employer does discriminate on the basis of religion if it can accommodate the religious practice without undue hardship. However, the accommodation provision does not affect the statute's underlying requirement that the employer's discriminatory practice relate to "compensation, terms, conditions, or privileges of employment" or that the practice "deprive any individual or [sic] employment opportunities or otherwise adversely affect his status as an employee." §2000e-2(a)(1) & (2). In other words, the accommodation provision does not affect the basic statutory requirement for adverse employment action. As with sex, race, color, and national origin, a plaintiff claiming religious discrimination under Title VII must show adverse employment action. Title VII only prohibits employer practices where the employer discriminates on the basis of religion *and* the employee suffers an adverse employment action. Therefore, Ali's reliance upon the accommodation provision in the definition of religion is misplaced.

Ali also relies upon the legislative history accompanying the adoption of the accommodation provision in an attempt to show that religious discrimination claims do not require a showing of adverse employment action. Ali cites to the history in which Congress expressed concern with the *Dewey* decision. *See, e.g.*, 118 Cong. Rec. 706 (1972) (statement by Sen. Randolph). Again, in *Dewey* the circuit court held that an employer does not discriminate on the basis of religion simply by failing to accommodate an employee's religious practice. We do not question that Congress adopted the accommodation provision in response to the *Dewey* decision. However, as discussed above, Congress's concern about the *Dewey* decision is not inconsistent with Title VII's requirement for adverse employment action. Therefore, the legislative history does not show that Congress intended to allow an employee to recover for religious discrimination under Title VII without showing an adverse employment action.

Ali also cites to the EEOC regulations implementing Title VII with respect to religious accommodation. The regulations, however, simply track the language of the accommodation provision in the statutory definition of religion. See 29 C.F.R. § 1605.2. The regulations do not address whether an adverse employment action is required.

Finally, Ali argues that a few cases stand for the proposition that a showing of adverse employment action is not required in Title VII religious discrimination cases. However, none of the cases she cites stand for, or even suggest, such a proposition. For example, Ali relies upon *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998). In *Rodriguez* the plaintiff police officer, who was Catholic, objected to being assigned to guard abortion clinics. The officer was employed throughout the litigation. Because the officer remained employed, Ali argues that Rodriguez held that a showing of

adverse employment action is not required. However, *Rodriguez* rejected the plaintiff's claim on an alternative ground without ever reaching the question of whether a showing of adverse employment action is required. *See id.* at 776. *Rodriguez*, therefore, is of no help to Ali.

In conclusion, a Title VII plaintiff claiming discrimination on the basis of religion must allege adverse employment action in order to survive a motion to dismiss under Rule 12(b)(6). The judgment of the district court is therefore

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. #99-1025-A

ZEINAB ALI,
Plaintiff,

v.

ALAMO RENT-A-CAR, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

By Order of December 3, 1999, this Court granted defendant's Motion to Dismiss and dismissed plaintiff's first amended complaint, without prejudice. Now pending before the Court is plaintiff's Motion to Amend Judgement pursuant to Fed. R. Civ. P. 59(e). For the following reasons, the Motion is DENIED.

Rule 59(e) provides a mechanism whereby an aggrieved party may petition the Court to alter or amend a judgment to accommodate an intervening change in controlling law, to account for new evidence not available at trial, or to correct a clear error of law or prevent manifest injustice. *See Thompson v.*

Direct Impact Co., 63 F. Supp. 2d 721 (E.D. Va. 1998). None of these circumstances exists in the present action to warrant a reversal of our ruling.

Plaintiff's primary contention is that we erred in ruling "that it does not violate [Title VII] for an employer to require an employee to abandon a mandatory religious observance at work, notwithstanding that the observance in no way interferes with the employee's work or the employer's mission." This assessment of our ruling is plainly incorrect because, when considering a motion to dismiss under Fed. R. Civ. P. 12(b) (6), a court does not resolve factual disputes, the merits of a claim, or the applicability of defenses; it simply tests the sufficiency of a complaint. *See Republican Party of North Carolina v. Martin*, 980 F. 2d 943, 952 (4th Cir. 1993). We dismissed the amended complaint because it failed to allege the elements of a prima facie case under Title VII in that plaintiff did not allege any adverse employment action.[1]

Without direct legal authority, plaintiff argues that it is incongruous with the purposes of Title VII that a claimant who refuses to acquiesce to an employer's demand that interferes with her religious practice must wait and suffer actual work- related injury in order to have standing to bring suit. The cases upon which plaintiff attempts to rely, *EEOC v. Ithaca Industries, Inc.*, 849 F. 2d 116 (4th Cir. 1988) and *Opuku-Boateng v. California*, 95 F. 3d 1461 (9th Cir. 1996), are distinguishable because they involve employees who alleged adverse employment action,

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[1]To state a claim for failure to accommodate a religious belief, an employee must demonstrate that: (1) she has a bona fide religious belief that conflicts with an employment requirement; (2) that she has informed her employer of this belief; and (3) that she was disciplined for failure to comply with the conflicting employment requirement. *See Chalmers v. Tulon Co.*, 101 F. 3d 1012 (4th Cir. 1996).

respectively being terminated and denied a promotion. Thus, these plaintiffs did sufficiently allege a prima facia case, enabling their complaints to proceed to the summary judgment stage. *See Rodriguez v. City of Chicago*, No. 95 C 5371, 1996 WL 22964, at *3 (N.D. Ill. January 12, 1996). Although it may be true that alleging actual injury is unnecessary for a claim to cognizable under Title VII, as pointed out by the district court in *Rodriguez*, a plaintiff must at the very least indicate what adverse employment action was threatened. *Id.* ("the threat of discharge (or of other adverse employment practices) is a sufficient penalty to establish the third element of the prima facie case"). We dismissed plaintiff's case because, even under the broad notice pleading requirements of Rule 8, she has not satisfied the requirement that she allege an actual or threatened adverse employment action.

To the contrary, the first amended complaint merely alleges that plaintiff was told she would be placed in a position with less customer contact or visibility if she did not remove her head scarf. Nothing in the complaint alleges that this threat of a change of job duties constituted potential adverse action. *See Jenkins-Allen v. Powell Duffryn Terminals, Inc.*, 18 F. Supp. 2d 885, 893 (N.D. Ill. 1998). Plaintiff has not alleged that the threatened position would impact her ability to obtain a promotion or to get a raise, how that would affect her job title or description as an administrative supervisor, or in what other ways it would have been generally undesirable.[2] Our ruling is consistent with *Boone v. Goldin*, 178 F. 3d 253 (4th Cir. 1999), in which the Fourth Circuit observed:

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[2]We note that counsel discussed these types of allegations for the first time at the hearing. It is precisely these types of adverse threats which must be included in the complaint.

> Absent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position. Because [plaintiff] has failed to allege that she suffered any adverse employment action, or to forecast any evidence of this, she cannot prevail on her claims of discrimination or retaliation.

178 F. 3d at 256-257. Indeed, plaintiff has even admitted that "for the purposes of this adjudication at bar [she] has claimed no work-related detriment." Mot. to Amend at 3. Thus, it is clear by plaintiff's own admission that the first amended complaint, as currently pled, fails to state a cognizable claim. Accordingly, it is hereby

ORDERED that plaintiff's Motion to Amend Judgment be and is DENIED.

The Clerk is directed to forward copies of this Order to counsel of record and to remove argument of this motion from the December 10, 1999 docket.

Entered this 7th day of December, 1999.

/s/
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. #99-1025-A

ZEINAB ALI, Plaintiff, v. ALAMO RENT-A-CAR, INC., Defendant.	• Alexandria, Virginia • December 3, 1999 • 10:00 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

THE COURT: All right. Well, what I'm doing is this complaint is not sufficient in my view. It is a legally insufficient complaint. It has not adequately alleged what I believe you have to allege in the Fourth Circuit is that an actual adverse action was taken.

I'm going to dismiss the complaint without prejudice and give you 11 days in which to refile, but I think under rule 11, you have got to conduct -- and I would hope, Ms. Khan, you might -- it's to your client's benefit to talk with counsel, give them

what information they need. It sounds to me based on what I've heard this morning is that you do not have sufficient evidence of any genuine adverse employment action.

In the Fourth Circuit, simply changing a person's job assignment, unless it has a negative impact on their career development or changes in the condition of their salary, it has to be a significant, not a minor, change in the terms and conditions of employment, even if it was related to an impermissible motive, in order for it to amount to a cognizable Title VII lawsuit.

So you have leave to refile the complaint within 11 days if you can do so within the strictures of rule 11.

[Transcript at page 25]